company for an amount equal to most of the contract money because he had actually done all the work under the contract. It was therefore to be expected that he would receive these moneys whether there was novation, or some other arrangement for completion of the work. In these circumstances, the receipt by him of these moneys does not outweigh all the other evidence I have referred to which led to the conclusion that there was no novation.

For these reasons in my judgment this appeal fails and should be dismissed with costs.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Hilborne, Chung & Co.*; *Donaldson & Burkinshaw.*

RE PEACE INSURANCE CO. LTD.

[F.C. (Barakbah Ag.L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) November 19, 1964]

[K.L. — Federal Court Civil Appeal No. 33 of 1964]

Companies — Allegation that director is guilty of misfeasance and breach of trust — Director only liable if it is shown that company was entitled to recover amount sought to be recovered — Companies Ordinance, 1940, ss. 137 and 267.

This was an appeal against part of a judgment of the High Court in Malaya ([1964] M.L.J. 232) made on the application of the liquidator of the Peace Insurance Company under section 267 of the Companies Ordinance for *inter alia* a declaration that the appellants had been guilty of misfeasance and breach of trust in relation to the company by procuring and permitting to be paid to themselves for the sale of the shares in the company the sum of $744,000 out of the funds belonging to the company. The declaration was granted by the High Court and on appeal it was contended that the learned judge was wrong in law in coming to the conclusion that a sum of $196,746.44 was part of the moneys of the company or moneys had and received for the use of the company. This sum had been received by one Foo Ah Soo, from prospective agents who had relied on his representation to them that he was about to acquire the entire shares of the company and on his promise that the company would enter into agency agreements to canvass insurance business with each of them. The sums collected from the agents was paid by Foo Ah Soo as purchase price of the shares in the company allotted to him. Subsequently Foo Ah Soo and two other directors bought up the entire share issue of the company for $744,000 in cash paid to the appellants. Of this sum $547,253.56 (including the $196,746.44) came out of the funds of the company.

Held: (1) to make a person liable under section 267(1) of the Companies Ordinance in respect of moneys received by him it must be shown that the company was entitled to recover the amount sought to be recovered from that person at the time he received it;

(2) as the sum of $196,746.44 was never part of the money of the company nor moneys which the company could recover from the appellants as moneys had and received by the appellants to the use of the company, the appellants could not be held liable under section 267(1) of the Companies Ordinance in respect of such sum.

Case referred to:—

(1) *Re Sale of Hotel and Botanical Gardens Ltd., ex parte Hesketh* (1898) 78 L.T. 368.

FEDERAL COURT.

Yong Pung-How for the appellant.

Y. S. Chong for the respondent.

Wee Chong Jin C.J. (Singapore): This is an appeal against the judgment of Ong J. of the High Court in Malaya made on an application by the liquidator of the Peace Insurance Co., Ltd. under section 267 of the Companies Ordinance 1940/46 for *inter alia* a declaration that the appellants and each of them have been guilty of misfeasance and breach of trust in relation to the company by (a) authorising and/or procuring a loan of $40,000 to themselves contrary to section 137 of the Ordinance and (b) procuring or permitting to be paid to themselves for the sale of the shares in the said company the total sum of $744,000 out of the funds belonging to the company.

Ong J. in respect of (a) above declared that the appellants and each of them had been guilty of misfeasance and breach of trust in relation to the company by procuring, authorising or permitting the loan to themselves as directors amounting to $37,500 contrary to section 137 of the Ordinance and in respect of (b) declared that the appellants and each of them had been guilty of misfeasance and breach of trust in relation to the company in procuring or permitting to be paid to themselves for the sale of 245 shares in the company the total sum of $744,000 out of funds belonging to the company.

The appellants are now appealing against the declaration made in respect of (b) but only limited to the sum of $196,746.44, having abandoned at the hearing of the appeal the grounds of appeal which relate to the sum of $547,253.56 which it is now conceded were moneys of the company so misapplied as to make the appellants liable under section 267.

At the hearing of the appeal counsel for the appellants conceded that the findings of fact which are contained in the judgment of Ong J. cannot be now disputed and are correct. It is however contended on the facts as found by the trial judge, he was wrong in law in coming to the conclusion that the sum of $196,746.44 was part of the moneys of the company or moneys had and received for the use of the company.

The facts as found by the trial judge were these. The company was a life insurance company which was compulsorily wound up under the Life Assurance Companies (Compulsory

Liquidation) Act 1962 by a winding-up order made on 13th March, 1962. The directors holding office on that date were three persons, Foo Ah Soo, Ooi Kheng Hoe and Khoo Poh Thye. These three persons had on 27th September 1961 bought up the entire share issue of the company for $744,000 paid in cash. Of this sum $547,253.56 came out of the funds of the company. Payment was made to the nine appellants.

The company was incorporated on the 10th October 1960 with a nominal capital of $1,000,000 divided into 1,000 ordinary shares of $1,000 each. The original subscribers to the memorandum of association were three persons who had subscribed to 5 shares each. They were bought out for $210,000 by a group of persons, nine of whom were the appellants who were appointed directors on October 30th, 1960. At the directors' meeting on the 17th November 1960 it was resolved that the company should commence business on 1st December 1960.

The nature of the business proposed to be carried on is contained in the minutes of the general meeting held on 30th October, 1960. The company was to issue three categories of policies. In category A, a monthly subscription or premium of $3 kept up for a qualifying period of 6 months entitled the policy-holder to payment of $300 on the death of the life insured, provided that payments were continued till the death. In categories B and C, the qualifying period was the same, of 9 months, but monthly subscriptions of $3 and $5 respectively entitled the claimants to payments of $400 and $600. There was no requirement of a medical examination and the majority of the lives insured, were old people. There were also no restrictions on the number of policies a person could take out on any one life. Agents of the company were remunerated with 15 per cent of collected subscriptions, monthly and yearly.

The business prospered almost immediately reaching a peak in February 1961. Claims on policies taken out started to come in from August 1961 and in September 1961 the amount paid out in respect of claims showed a total of over $30,000. There was no evidence that the directors invested any of the moneys collected as premium.

On the 12th September 1961 following on negotiations a few days earlier between one of the appellants, Hor Hoi Thin and Foo Ah Soo an agreement was signed between three of the appellants, Chin Yew Sin, Hor Seng Cheong and Hor Hoi Thin, (representing all share-holders of the company) and Foo Ah Soo for the sale to him of all the issued shares of the par value of $245,000 for $800,000. Upon the execution of this agreement Foo paid them $80,000 as deposit to account of the purchase price.

Foo Ah Soo had raised the deposit of $80,000 by representing to prospective agents of the company that he had entered into an agreement to buy over the entire issued shares of the company and on his promise that the company would enter into agency agreements with each of them granting to each of them the sole right to canvass insurance business for the company in respect of certain designated territories.

By the 27th September 1961 Foo Ah Soo had similarly obtained a total of another $116,746.44 from other prospective agents of the company.

On the 27th September 1961 Foo was appointed a director of the company and on the same day Foo paid the appellants the balance of the purchase moneys in respect of the shares of the company belonging to the appellants which he had contracted to purchase from them.

It is not in dispute that before the 27th September 1961 Foo Ah Soo had never been held out by the company or by any director of the company as a person authorised to enter into any agency agreement for or on behalf of the company with prospective agents of the company nor was he then a director or servant of the company.

Although there would appear to be no direct evidence on this aspect of the matter, it seems the only inference that can be drawn from the whole of the evidence is that these prospective agents made payments to Foo relying on his representation to them that he was about to acquire the entire shares of the company and on his promise that the company would enter into agency agreements with each of them.

I turn now to the law. Section 267(1), to set out only the relevant words, provides that

> "If in the course of winding up a company it appears that any....past or present director....has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the....liquidator.... examine into the conduct of the....director....and compel him to repay or restore the property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just."

It is not in dispute that to found liability under this section by reason of misfeasance or breach of trust, there must be an actual loss to the company arising from such a misfeasance or breach of trust.

It is also not in dispute that liability under this section is established even if the loss to the

company by reason of a misfeasance or breach of trust is in respect not of moneys of the company but of moneys had and received to the use of the company.

The conclusion arrived at by the trial judge with regard to these two sums of $80,000 and $116,746.44 is set out in his judgment as follows:—

"In addition to the $80,000 deposit, Foo had collected a further $116,746.44 from prospective agents for payment to the company. This sum deposited with Foo's solicitors, was on September 27 withdrawn and paid into his personal account, together with the cheque for $547,253.56, in order to meet his cheque for $664,000. The result is that all moneys had and received by Foo for the use of the company had been utilised for paying out the $664,000. Hor Hoi Thin and his associates had received in all two sums, $80,000 and $664,000. Since the $80,000 — although paid direct by Foo to the vendors — was also money had and received by him for the use of the company, it was misapplication by Foo of the company's moneys of which the vendors knowingly had the benefit. In *Re Sale of Hotel & Botanical Gardens Ltd., ex parte Hesketh* (1898) 78 L.T. 368, 370 Lindley M.R. said, with reference to section 10 of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. C. 63), which corresponds with our section 267, as follows:—'It would, I think, be a very narrow construction of section 10 to say that 'moneys or property of the company' means only that which belonged to the company before it came into the possession of the person liable to account for it. Money had and received for the use of a company at law or in equity may, without impropriety, be called money of the company where accuracy of language in respect of ownership is immaterial.' Therefore, in respect of the total sum of $744,000 Hor and his associates should be liable for repayment to the liquidator."

It is necessary therefore to examine the facts in that case. Hesketh in 1888 acted temporarily as secretary of a company formed for the purchase of a hotel and gardens, the vendor of which a Mr. Witty had offered £2,000 to him and other persons if they would form such a company. Hesketh received £250 of this amount to the knowledge of the other persons, who became the directors and the date and the parties to the agreement under which he took this profit was stated in the prospectus issued to the public inviting shares and subscriptions. In May 1894 the voluntary winding-up of the company was ordered to be continued under the supervision of the court. A summons was taken out by the liquidator under section 10 of the Companies (Winding-up) Act 1890 asking that Hesketh might be ordered to contribute to the assets £250 and interest as secret profit made by him in a fiduciary position for which he might be held liable. Hesketh was found to have known all about the payments made by Witty to the other persons who became the directors of the company.

Wright J. found on the facts that although Hesketh was clearly a promoter of the company, he could not be regarded as a promoter, who has got possession of, and kept for his own use, moneys which ever were the moneys of the company. He however found Hesketh liable on the ground that as promoter and therefore in a highly fiduciary relationship to the company, Hesketh made secret profit out of his relationship to the company. On appeal, the Court of Appeal agreed with Wright J. that on the facts Hesketh was a promoter of the company but, after stating the principle that to bring a promoter within the operation of section 10 of the Companies (Winding-Up) Act 1890 it must be proved that the promoter has misapplied or retained, or become liable or accountable for, money of the company, or has been guilty of misfeasance or breach of trust in relation to the company to the extent of the sum sought to be recovered from him, allowed the appeal on the ground that the company never had any cause of action against Hesketh in respect of the £250 as the company was not entitled to recover that amount from him when he received it. The Court of Appeal was of the opinion that the £250 was not paid to Hesketh for anything done or omitted to be done by Hesketh in the character of secretary of the company and that Hesketh was guilty of no breach of duty as secretary in receiving the £250. It was also of the opinion that the fact that Hesketh knew all about the payments to the directors who were accountable to the company for the payments they received did not give the company any right to require Hesketh to pay over to it the £250 paid to him. Hesketh's case then is an authority for the proposition that to make a person liable under our section 267(1) in respect of moneys received by him it must be shown that the company was entitled to recover the amount sought to be recovered from that person at the time he received it or to put it in another way that the company has a cause of action against that person in respect of it.

Ong J. came to the conclusion that because the appellants knowingly had the benefit of moneys had and received by Foo to the use of the company and which Foo had misapplied by using these moneys to pay for the shares which he bought from the appellants, the appellants were liable under section 267(1).

I am unable to agree with this conclusion. It seems to me that when the appellants received from Foo the $80,000 in early September the company did not become entitled to recover this amount from the appellants that is to say never had any cause of action against the appellants in respect of this amount notwithstanding the fact the appellants, as Ong J. has found, knew that Foo had obtained this money from prospective agents of the company. The appellants received this sum from Foo not as directors but in part payment of their shares which they sold

to Foo. Equally when the appellants received from Foo the $664,000 part of which amounting to $116,746.44 were moneys obtained by Foo from prospective agents of the company, it seems to me that the company did not become entitled to recover the $116,746.44 from the appellants. These two sums of $80,000 and $116,746.44 were never moneys of the company nor were they moneys which the company could recover from the appellants as moneys had and received by the appellants to the use of the company. At the time Foo received these moneys from prospective agents of the company and at the time Foo paid them to the appellants there was no evidence, and indeed the evidence would indicate the contrary, that Foo had done any act acknowledging to the company Foo's readiness to pay to the company any part of the moneys he had received from these prospective agents. At the time these payments were made by Foo to the appellants it was not in dispute that Foo stood in no fiduciary relationship to the company. On these facts whatever rights, if any, the company had in respect of these moneys in relation to Foo with which we are not concerned in this appeal, there is clearly no basis for a finding of liability under section 267(1) as against the appellants.

The plain fact of the whole matter is that Foo, either on the suggestion of one or some or all of the appellants or on his own initiative, had obtained from these gullible prospective agents large sums of money which he then proceeded to use for his own purpose, namely to buy from the appellants the entire interest in the company. The fact that the appellants were also directors of the company at the time Foo obtained these moneys from these prospective agents and at the time when Foo paid them the deposit and the balance of the purchase price for their shares in the company which they had sold to Foo and that they knew the manner in which Foo had obtained these moneys is not sufficient in law to make them liable under section 267(1) and in the result I would allow this appeal in respect of the sum of $196,746.44.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal partly allowed.

Solicitors: *Shook Lin & Bok; Shearn, Delamore & Co.*

RE B. NAIDU

[R.Cr.J. (Ong J.) September 24, 1964]

[K.L. — Criminal Revision No. 18 of 1964]

Criminal Procedure — Trial — Court must hear both sides — Disposal of case ex parte.

Employees Provident Fund Ordinance, 1951, s 16A (1) & (4) — Payment of contribution — Habitual defaulter — Accumulated arrears — Sentence.

It is imperative at all criminal trials that the court should hear both sides. It is the duty of the court not only to hear the defence but also the prosecution. There should be no justification for disposing of any criminal case *ex parte* except in those where a defendant is permitted to plead guilty by letter.

CRIMINAL REVISION.

Nik Zahir (Deputy Public Prosecutor) for the Public Prosecutor.

Defendant in person.

Ong J.: This matter was brought to my notice by the deputy public prosecutor for revision. The defendant failed on October 14, 1963 to appear before the magistrate, Kuala Lumpur on a summons charging him with two offences under section 16A(1)(c) of the Employees Provident Fund Ordinance, 1951. A warrant of arrest was thereupon issued and the date of trial postponed to December 11, 1963. When the prosecuting officer of the Ministry of Labour duly appeared in court on December 11, 1963, he learned to his surprise that on October 15, 1963 the defendant had surrendered himself to the court, pleaded guilty to the charges and was convicted and sentenced to a fine of $50 on each charge. The prosecution was at no time informed in advance that the case was going to be disposed of and therefore had no opportunity of acquainting the magistrate with facts which undoubtedly were material as affecting the sentence.

It is imperative at all criminal trials that the court should hear both sides. It is the duty of the court not only to hear the defence but also the prosecution. In this case there undoubtedly were serious aggravating circumstances which the learned magistrate could not and should not have ignored in passing sentence, namely, (a) the defendant had been a habitual defaulter in respect of other contributions in spite of repeated reminders and (b) a certificate under section 16A(4) would have been produced by the prosecution that the defendant was owing accumulated arrears amounting to no less than $1,472.

I accordingly called up this case for revision when the certificate of arrears was produced and the aggravating circumstances of this case were admitted by the defendant. I considered it pointless to refer the matter back to the learned magistrate and I have accordingly set aside the order of the court below and instead thereof I have substituted a fine of $150 on each charge and directed that the arrears certified due be recovered as provided by section 16A(4) in the event of payment not being made within 30 days.

I would impress upon all magistrates that there should be no justification for disposing of any criminal case *ex parte* except in those where a defendant is permitted to plead guilty by letter.

Order accordingly.